(5)

No. 96-203

IN THE

Supreme Court of the United States

October Term, 1996

JOYCE B. JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF DAVID R. KNOLL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

STEPHEN L. BRAGA*
ROBERT J. McGAHAN
MILLER, CASSIDY, LARROCA
& LEWIN, LLP
2555 M Street, N.W.
Washington, D.C. 20036
(202) 293-6400

**Counsel of Record*

December 30, 1996

CASILLAS PRESS, INC., 1717 K STREET, N.W., WASHINGTON, D.C. 20036

30 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

RULES:

OTHER AUTHORITIES:

No. 96-203

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

JOYCE B. JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF DAVID R. KNOLL AS AMICUS CURIAE IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST

David Knoll is an individual citizen and resident of the State of New York, who presently stands convicted of one count of violating 18 U.S.C. § 1001. At the trial where he was convicted of this charge, which occurred prior to this Court's decision in United States v. Gaudin, 115 S.Ct. 713

(1995), the judge told the jury, without objection, that: "the materiality of the fact allegedly falsified, concealed or covered up is not a matter with which you are concerned, but rather a question for the Court to decide. You are instructed that the facts charged in the indictment are material facts." [1] As one ground of his pending appeal to the United States Court of Appeals for the Second Circuit, Mr. Knoll has asked that Court to reverse his conviction because the judge's handling of the materiality element at trial violated his constitutional right to have the jury render a decision on that element of this offense, as established in Gaudin. [2] In response to this argument, the Government has conceded the Gaudin error below, but has maintained that it was not "plain" error and was, in fact, "harmless" error.

The Gaudin issues in Mr. Knoll's pending appeal are, therefore, identical in many respects to the Gaudin-related issues on which review has been granted in this case. Since a decision by this Court on those issues could obviously impact the Second Circuit's resolution of his appeal, Mr. Knoll has a significant and concrete interest in this Court's

---

1 Tr. at 6456-6457.

2 In Gaudin, this Court unanimously held:

> The Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged. The trial judge's refusal to allow the jury to pass on the 'materiality' of Gaudin's false statement infringed that right.

115 S. Ct. at 2320.

decision in this case. In addition, since undersigned counsel for Mr. Knoll has already briefed and argued these same issues before the Second Circuit, he has some expertise with these issues that may help to facilitate the Court's ultimate resolution of this case. Counsel for both parties to this case have graciously consented to the filing of this amicus brief.

SUMMARY OF ARGUMENT

1. Post-Gaudin claims that have arisen in the federal courts take one of two forms: cases where a trial judge has directed a verdict against a criminal defendant on the element of materiality and cases where the judge has merely failed to instruct the jury on that element. This case, like Mr. Knoll's case, is the directed verdict form of such a claim. Since at least 1895, when this Court decided Sparf and Hansen v. United States, 156 U.S. 51, 105-06 (1895), this Court's decisions have reflected a uniform constitutional prohibition against such a directed verdict because of its patent infirngement of the right to trial by jury. Fidelity to the principles of this Court's prior decisions in this area commands a reversal of the directed verdict against petitioner below.

2. Prior to this Court's Gaudin decision, the established law in ten of the eleven federal judicial circuits provided that the element of materiality was to be decided by the court, rather than the jury. Trial counsel litigating such criminal cases involving this element prior to Gaudin, in these ten judicial circuits, had no sound basis for asking the trial court to allow that element to be decided by the jury and/or for objecting to its refusal to do so, since the trial judge was bound by precedent to act as he did. In such a circumstance, no purpose would be served by requiring a contemporaneous objection at trial to the judge's handling of the materiality

element. Accordingly, the plain error rule, which is designed to enforce the failure to raise such a contemporaneous objection, should be likewise inapplicable to the appeal of such post-Gaudin issues.

3. In Arizona v. Fulminante, 111 S. Ct. 1246 (1991), this Court established an analytical dichotomy for determining when harmless error analysis applied to constitutional errors at trial: classic trial errors are subject to such analysis, while structural errors are not. In Sullivan v. Louisiana, 113 S. Ct. 2078 (1993), this Court made it clear that the actual deprivation of a jury verdict in a criminal case constituted "structural error," and identified the "directed verdict" as one example of such an error. Since this case involves a directed verdict against petitioner on the element of materiality, the error here was plainly a "structural error" which cannot be analyzed for prejudice under either harmless or plain error principles.

ARGUMENT

As amicus curiae, Mr. Knoll has attempted to pay strict heed to this Court's admonition against repeating facts and legal authorities to be presented to the Court by the parties. As a result, much of the general constitutional and caselaw background for the arguments herein has been omitted because it will undoubtedly appear in the briefs of the parties. The following arguments, therefore, must be read in context with the related points made in the principal briefs filed with the Court.

The issues before this Court for review in this case all implicate the meaning and scope of the "right to a . . . trial by . . . jury" guaranteed to a criminal defendant by the Sixth Amendment to the United States Constitution. These issues

have all, quite naturally, arisen in the wake of this Court's decision in United States v. Gaudin, 115 S. Ct. 2310 (1995), which reaffirmed the importance of that jury trial right for each and every element of a criminal charge. The Court's decision in this case should further reinforce the importance of that constitutional command against the admittedly seductive concerns of expediency that underlie both the Eleventh Circuit's decision below and the respondent's position herein.

I
A TRIAL JUDGE CANNOT DIRECT A VERDICT AGAINST A CRIMINAL DEFENDANT NO MATTER HOW OVERWHELMING THE EVIDENCE MIGHT APPEAR TO BE

It is, by now, an unassailable proposition that "a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict . . . regardless of how overwhelming the evidence may point in that direction." United States v. Martin Linen Supply Co., 430 U.S. 564, 572-73 (1977). Yet that is precisely what happened below, as in Mr. Knoll's case, when the trial judge "instructed the jury that Johnson's statements to the grand jury were material." (Pet. App. at 4a)(emphasis added). Since "the theory under which jury instructions are given by trial courts and reviewed on appeal is that juries act in accordance with the instructions given them," City of Los Angeles v. Heller, 475 U.S. 796, 798 (1986), the trial judge's instruction on materiality effectively -- and unconstitutionally -- directed a verdict against the defendant on that element of the offense with which he was charged.

This "directed verdict" instruction in this case represents one variant of the post-Gaudin decisions by the

lower federal courts that this Court has been asked to review. The other variant is represented by those decisions where the trial judge simply fails to instruct the jury at all on the materiality -- or another similarly required -- element of the offense. See generally Roy v. Gomez, 81 F.3d 863, 866 (9th Cir. 1996)(en banc)(identifying distinction between cases in which "a court instructs the jury that an element of the crime has been established as a matter of law" and cases in which a court "simply fails to alert the jurors they must consider it"). [3] The critical distinction between these two variants of the issue, however, has been missed by many of the courts confronting post-Gaudin claims, [4] and apparently by the Government as well. [5] Instead, both variants of the issue have routinely been lumped together under the general

---

[3] The Ninth Circuit's decision in Roy v. Gomez was subsequently reversed by this Court on other grounds relating to the nature of the "harmless error" test used by that court to evaluate the habeas corpus claim before it. See California v. Roy, 1996 WL 633365 (U.S. 11/4/96).

[4] But see Gaudin, 115 S.Ct. at 2318 ("Horning's holding that it was harmless error, if error at all, for a trial judge effectively to order the jury to convict has been proved an unfortunate anomaly in light of subsequent cases.")

[5] For example, in its brief concurring in appellant's request for review in this case, the Government asserted that the decision below "conflicts with the Ninth Circuit's recent decision in United States v. Keys, No. 93-50281, 1996 WL 512389 (Sept. 11, 1996)." Certiorari Brief For The United States ("Govt. Cert. Br.") at 4. However, the decision below involved the "directed verdict" variant of post-Gaudin claims, while Keys simply involved the "omitted" instruction variant of the same.

category of analysis for erroneous jury instructions. The distinction cannot be so easily overlooked.

Constitutionally, it simply makes a world of difference in the analysis whether the trial judge directed a verdict against the defendant on the element of materiality or merely failed to instruct the jury at all on that element. In the latter circumstance, "[e]ven though an element of the offense is not specifically mentioned, it remains possible the jury made the necessary finding." Roy v. Gomez, 81 F.3d at 867. In the former circumstance however, given our systemic presumption that juries act in accordance with the instructions they are given, there is no possibility that "the jury made the necessary finding." Thus, in the "directed verdict" variant, it is always necessarily the case that a defendant has been actually deprived of his constitutional right to have the jury decide the element of the offense in question, while in the omitted element variant the same conclusion need not always be true.

In this "directed verdict" variant of the post-Gaudin cases, therefore, there is no way to affirm the decision below without concluding that it is constitutionally permissible for a trial judge to override a defendant's constitutional right to trial by jury and direct a verdict against him. The judge's conduct simply leaves no analytical room for appellate hypothesizing whether the jury in fact made a decision on the element in question against the defendant. The jury was expressly told not to do so, and that ends any such inquiry. Thus, this case squarely presents this Court with passing upon the propriety of a directed verdict against the defendant in a criminal case.

But in an unbroken line of instructional error cases, this Court has repeatedly referred to the possibility of such a directed verdict as a complete constitutional taboo. For example, in Connecticut v. Johnson, 460 U.S. 73 (1983), the

plurality opinions by Justice Blackmun and Justice Powell vigorously disagreed whether a conclusive Sandstrom instruction amounted to a directed verdict against the accused or not, [6] but the unanimously agreed upon premise for this debate was the fact that a directed verdict on an element of a criminal offense was constitutionally impermissible. Next, in Rose v. Clark, 478 U.S. 570 (1986), the Court adopted Justice Powell's position in Connecticut v. Johnson that a Sandstrom presumption was not equivalent to a directed verdict (id. at 580), but in doing so reaffirmed that "a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict" because "in such a case . . . the wrong entity judge[s] the defendant guilty." Id. at 578. Similarly, in Pope v. Illinois, 481 U.S. 497 (1987), the Court reaffirmed that the bottom-line of its analysis was to ensure that "the jurors were not precluded from considering the question" at issue. Id. at 503. Finally, in Carella v. California, 491 U.S. 263 (1989), Justice Scalia's concurrence again reiterated the established dogma that it is "constitutionally impermissible for a judge to direct a verdict for the State." Id. at 268. [7]

---

[6] Compare 460 U.S. at 84 (Blackmun, J.)("conclusive presumption . . . is the functional equivalent of a directed verdict") with 460 U.S. at 95 (Powell, J.)("directed verdict removes an issue completely from the jury's consideration" while "a presumption, by contrast, leaves the issue ultimately to the jury")

[7] As partial support for this point, Justice Scalia quoted from this Court's decision half a century ago in Bollenbach v. United States, 326 U.S. 607, 614 (1946): "the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and

Nonetheless, we are told by the Government that this Court should have no concern about the defendant's constitutional right to trial by jury "where, as here, no reasonable juror could have found a defendant's false statements immaterial." (Govt. Cert. Br. at 7-8)(emphasis added). [8] But the relevant inquiry under this Court's jurisprudence has never been whether a jury presented with the Gaudin question could -- or would -- have convicted petitioner, but rather whether the jury that tried him substantially answered the Gaudin question adversely to him in the course of its actual deliberations. [9] With respect to the "omitted element" variant of post-Gaudin claims, the courts and counsel can debate the proper answer to this inquiry on a case-by-case basis. [10] With respect to the

---

standards appropriate for criminal trials."

[8] The highlighted verb form used by the Government to make this point only highlights the flaw in the Government's argument. The Government's verbiage is strikingly similar to that which was expressly rejected in Sullivan v. Louisiana, 113 S. Ct. 2078 (1993), when this Court found that it was "not enough" for an appellate court to conclude "that the jury would surely have found petitioner guilty beyond a reasonable doubt." Id. at 2082.

[9] See generally Yates v. Evatt, 500 U.S. 391, 403 (1991)("To say that an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the jury considered on the issue in question").

[10] This is the basis underlying the many simple instructional error cases relied upon by the Government and the court below where, despite the defective jury charge, there was a reason to conclude that the jury still necessarily decided

"directed verdict" variant of post-Gaudin claims however, as here, there can be no debate about the proper answer to the relevant inquiry; when a jury is affirmatively told not to pass upon the element in question, there is no ground for assuming that it did anything but follow that instruction. [11]

More importantly, if the directed verdict against petitioner is sustained in this case, as the Government requests, because of the assertedly conclusive nature of the evidence on the materiality element of this offense, then the door will be opened to the rendition of directed verdicts in almost every other circumstance imaginable. The reality is that the evidence against most criminal defendants in the courts of this country is frequently overwhelming. As a result, the first and foremost battleground for defendants in every criminal trial will thus become endeavoring to convince the judge that the evidence against them is not conclusive, which would stand the constitutional right to a jury trial on its head. This directed verdict argument by the Government presents the Court with an extremely slippery slope which is better off avoided in favor of a level, and constitutional, playing field.

The judiciary's supreme authority is "to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). In a criminal case, however, it is the jury's supreme authority to say what the facts are. The decision below, and

---

the element of the offense in question.

[11] It would, of course, open up an entire Pandora's box of additional jurisprudential problems if the Court were to abandon the time-honored assumption that juries follow the instructions they are given, and there is certainly no factual basis for doing so herein.

those like it in other federal courts around the country, blur this fundamental division of power. But such "power[s] definitely assigned by the Constitution," Williams v. United States, 289 U.S. 553, 580 (1933), cannot be so easily reassigned in the interest of a "more efficient" criminal justice system. As this Court has previously held, "policy arguments supporting even useful 'political inventions' are subject to the demands of the Constitution which defines powers and . . . sets out just how those powers are to be exercised." INS v. Chadha, 462 U.S. 919, 945 (1983). "[U]nder our system of justice, juries alone have been entrusted with th[e] responsibility" for determining criminal guilt, Weiler v. United States, 323 U.S. 606, 611 (1945)(Black, J.), and it is with "juries alone" that this awesome responsibility should remain.

II

AN ERROR THAT IS UNOBJECTED TO AT TRIAL BECAUSE IT WAS CONSISTENT WITH THEN-EXISTING LAW SHOULD BE REVIEWED ON APPEAL UNDER RULE 52(A)

In the decision below, the Eleventh Circuit held that "because Johnson did not object at trial to the district court's determination of the materiality issue, we review the district court's decision to reserve the materiality decision for itself for plain error" under Rule 52(b). (Pet. App. at 6a-7a)(emphasis added). The Government agrees with the standard of review chosen by the Eleventh Circuit. [12] The

---

[12] See Govt. Cert. Br. at 7 ("We believe that the plain error standard of Rule 52(b) is applicable to a district court's failure to submit the materiality question to the jury in the

petitioner disagrees with this standard of review "where, as in the present case, a motion or objection would have been utterly frivolous and wasteful in light of clear, binding precedent at the time of the trial and so was not raised." (Pet. at 15-16). The distinction is important because of the practical differences in the application of the two standards of review, including the "discretionary" aspect of relief under the plain error standard which is not present under the ordinary error standard of Rule 52(a). [13]

We submit that an unobjected to error in the circumstances of this case should be reviewed under Rule 52(a). In this regard, Rule 52 of the Federal Rules of Criminal Procedure must be read in conjunction with Rule 51, which provides the affirmative justification for the contemporaneous objection rule at trial. Rule 51 states, in pertinent part:

> it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which that party desires the court to take or that party's objection to the action of the court and the grounds therefor . . ..

---

absence of a timely objection, whether or not such an objection would be inconsistent with a 'solid wall of circuit authority.'")(quoting United States v. Keys, supra).

[13] As one leading commentator has recognized, Rule 52 actually "recognizes three classes of errors, though only two are mentioned by name in the rule;" these are "harmless error," "reversible error," and "plain error." 3A Wright, Federal Practice and Procedure (Criminal 2d), § 851 at 294-95 (1982).

The purpose of this rule is plainly to require trial counsel to make known to the trial court both his requests for court action and his objections to court action so that the trial judge has the opportunity to make a fully informed decision on what action to take. [14] The goal of the contemporaneous objection rule is to eliminate the "criminal trial [as] a game for sowing reversible error in the record." Kotteakos v. United States, 328 U.S. 750, 758-60 (1946). [15]

But neither the purpose nor the goal of this rule is furthered by its application to a situation where binding judicial precedent leaves a trial court with no choice as to what action it must take. Further informing the trial court would be a meaningless exercise in such a circumstance because the trial court is bound to act as established precedent dictates regardless of how it is so informed, just as there would be no point in endeavoring to sow the error in question into the record since it would be present already as a matter of established precedent. It would thus be an "unreasonable result" to interpret the contemporaneous objection rule to be

---

[14] See, e.g., United States v. Young, 470 U.S. 1, 15-16 (1985)(plain error rule is designed "to encourage all trial participants to seek a fair and accurate trial the first time around").

[15] Accord, United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 238-39 (1940)("counsel for the defendant cannot as a rule remain silent, interpose no objections, and after a verdict has been returned seize for the first time on the point [as] . . . improper and prejudicial").

applicable to such a situation. American Tobacco Co. v. Patterson, 456 U.S. 63, 71 (1982). [16]

The final clause of Rule 51 also supports a finding that the contemporaneous objection rule should not apply to situations where an objection would be futile as a matter of law. That clause provides that "if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice that party." Fed. R. Crim. Pro. 51. This qualification to the contemporaneous objection rule fits perfectly, of course, with the purpose and goal of the rule as described above. It also fits perfectly with the point argued herein, restated as "if a party has no opportunity [to influence] a ruling or order, the absence of an objection does not thereafter prejudice that party." [17] When a "solid wall" of circuit authority inevitably preordains a certain ruling or order, then trial counsel cannot influence the court's action with respect to that ruling or order and he should be under no

---

[16] See also Douglas v. Alabama, 380 U.S. 415, 422-23 (1965)("In determining the sufficiency of objections we have applied the general principle that an objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient . . .. No legitimate state interest would have been served by requiring repetition of a patently futile objection . . .."). See generally 3A Wright, supra, § 842 at 290 & n.16.

[17] See also United States v. Wiles, 1996 WL 707539 at * 10 (10th Cir. 12/10/96)(en banc)(citing the final clause of Rule 51 as support for the conclusion that defendants had not waived their Gaudin challenges since "[a]t the time of their trials, they were not aware of this right" and, therefore, had no known "opportunity to object").

obligation to go through a pointless ritual of objecting to its entry "for the record." See California Federal Savings & Loan Assn. v. Guerra, 479 U.S. 272, 284 (1987)(thing may be within the letter of a statute and yet not within the statute because not within its spirit). [18]

Beyond the foregoing interpretive support for the conclusion that the contemporaneous objection rule should be inapplicable to this case, there is also a significant practical policy concern buttressing that conclusion as well. As the Ninth Circuit has noted, in such circumstances:

> were we to insist that an exception be taken to save the point for appeal, the unhappy result would be that we would encourage defense counsel to burden district courts with repeated assaults on their settled principles out of hope that those principles will be later overturned, or out of fear that failure to object might subject counsel to a later charge of incompetency.

---

[18] See also 3A Wright, supra, § 842 at 289-90 ("The general rule requiring counsel to make clear to the trial court what action they wish taken should not be applied in a ritualistic fashion. If the problem has been brought to the attention of the court, and the court has indicated in no uncertain terms what its views are, to require an objection would exalt form over substance.")

United States v. Scott, 425 F.2d 55, 57-58 (9th Cir. 1970)(en banc). [19] The Second Circuit has reached a similar conclusion:

> [w]ere we to penalize Ingber for failing to challenge such entrenched precedent, we would ascribe to attorneys and their clients the power to prognosticate with greater precision than the judges of this court. Such a rule would encourage appeal of even well-settled points of law. We see no value in imposing a responsibility to pursue such a 'patently futile' course.

Ingber v. Enzor, 841 F.2d 450, 454-55 (2d Cir. 1988). [20] The truth is that there is no value to be added to the criminal justice system by dictating that defense counsel follow such a course of conduct and, therefore, this Court should not do so.

---

[19] As a result, "[s]ince 1970," the Ninth Circuit has "advised criminal defense counsel in [its] circuit that when faced with a 'solid wall of circuit authority' endorsing a jury instruction, no objection to that instruction need be registered in the trial court to preserve the point on appeal should that 'solid wall' suddenly crumble in the interim and render the instruction defective." Keys, 1996 WL 512389 at * 4.

[20] Accord, United States v. Tillem, 906 F.2d 814, 825-26 (2d Cir. 1990)(distinguishing between when there is, and is not, sufficient "established Circuit authority to make such an objection futile"). Cf. Peck v. United States, 1995 WL 764340 at * 6 (2d Cir. 12/28/95)(discussing "cause to excuse a failure to pursue" an issue under habeas jurisprudence)(the Peck decision was subsequently reheard by the Second Circuit en banc, with no decision yet, on other grounds).

Accord, United States v. American Trucking Assn., 310 U.S. 534, 543 (1940)(court will avoid interpretation that leads to futile results). [21]

Rules 51 and 52 of the Federal Rules of Criminal Procedure undeniably serve important purposes in our criminal justice system. Those purposes are beside the point in the context of this case. The only way to apply the contemporaneous objection and plain error rules to this case would be to cut them loose from their analytical moorings in favor of an overly literal reading of their text without a corresponding purpose -- and with a significantly negative practical result. There is no legitimate warrant for doing so. As Judge Mills of the United States District Court for the

---

[21] Moreover, were the Court to find the contemporaneous objection rule applicable to this situation, it would create an unfortunately anomalous situation with respect to ineffective assistance of counsel claims under Strickland v. Washington, 466 U.S. 668 (1984). Given the state of pre-Gaudin law in ten federal judicial circuits, it would hardly have been constitutionally deficient representation by trial counsel to have failed to object to a trial judge's decision to decide the element of materiality, rather than allow the jury to do so. See generally Lockhart v. Fretwell, 506 U.S. 364 (1993). Yet applying "plain error" analysis as a consequence of trial counsel's failure to register such a contemporaneous objection, at least one circuit court of appeals has found that the failure to object has an outcome determinative effect on the resolution of post-Gaudin claims. See United States v. Ross, 1996 WL 41564 at * 7-9 (7th Cir. 2/2/96). There is no need to condone such a Catch-22 for criminal defendants when a preeminent constitutional right, such as the right to trial by jury, is at stake.

Central District of Illinois recently ruled in similar circumstances:

> Here, the law was clear in the Seventh Circuit, i.e., materiality was a question of law for the court. So how can [the defendant] be faulted for not objecting to the materiality issue at trial? What could he have possibly objected to? Since the law was clear in this circuit prior to Gaudin, [the defendant's] sole argument in support of such an objection would have been to ask the district court to overrule the 'well settled' law in the Seventh Circuit. Obviously, an argument of this nature would have been a waste of evryone's time.

United States v. Pearson, 897 F. Supp. 1147, 1149 (C.D. Ill. 1995). There is no reason to reach any different conclusion in this case. [22]

---

[22] Indeed, at the time of Mr. Knoll's trial, controlling precedent not only in the Second Circuit, but in ten of the eleven federal judicial circuits dictated that the element of materiality was to be decided by the court rather than the jury. See, e.g., United States v. Jerke, 896 F. Supp. 962, 964 n. 2 (D.S.D. 1995). In addition, by the time of Mr. Knoll's trial, this Court had already denied at least one petition for a writ of certiorari raising this very issue. See Hansen v. United States, 475 U.S. 1045 (1986)(denying review of United States v. Hansen, 772 F.2d 940 (D.C. Cir. 1985)).

III

A DIRECTED VERDICT BY A TRIAL JUDGE CONSTITUTES "STRUCTURAL ERROR" UNDER SULLIVAN V. LOUISIANA WHICH CANNOT BE SUBJECTED TO "HARMLESS" ERROR REVIEW

Just over five years ago, this Court established an analytical dichotomy for determining which types of errors in trial proceedings are subject to harmless error and which are not. See Arizona v. Fulminante, 111 S. Ct. 1246 (1991). In Fulminante, the Court determined that "classic 'trial error'" would fall into the former category, while "structural defects in the constitution of the trial mechanism" would fall into the latter. Id. at 1264-1265. The Court endeavored to explain the distinction between these two categories by explaining that "structural error" would be a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." Id. at 1265. [23] Although some types of errors may not be easy to "classif[y] so neatly," it appears that all members of the divided Fulminante Court agreed that a "directed verdict" by a trial judge against a criminal defendant would constitute "structural error." [24]

---

[23] The Fulminante Court also noted that the "common thread" in the "trial error" category was "error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." Id. at 1264.

[24] See id. at 1256. In this portion of the Fulminante decision, four members of the Court (Justices White, Marshall, Blackmun and Stevens) joined in the following text:

Two years later, in Sullivan v. Louisiana, 113 S. Ct. 2078 (1993), a unanimous Court joined the following declaration in Justice Scalia's majority opinion:

> Denial of the right to a jury verdict of guilt beyond a reasonable doubt is certainly an error of the [structural defect] sort, the jury guarantee being a 'basic protectio[n]' whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function. The right to trial by jury reflects, we have said, 'a profound judgment about the way in which law should be enforced and justice administered.' The deprivation of that right, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error.'

> As the majority concedes, there are other constitutional errors that invalidate a conviction even though there may be no reasonable doubt that the defendant is guilty and would be convicted absent the trial error. For example, a judge in a criminal trial 'is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict regardless of how overwhelmingly the evidence may point in that direction.'

(Citations omitted). None of the remaining Justices took issue with this point in any of the additional opinions in the case.

Id. at 2083 (citations omitted). [25] It could hardly be clearer that the touchstone of this analysis applies just as fully to a directed verdict by a trial judge against a criminal defendant as it did to the defective reasonable doubt instruction in Sullivan. Justice Scalia himself confirmed this point, by negative implication, for the unanimous Court in Sullivan: "The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal." Id. at 2082 (emphasis added).

These two recent decisions by the Court, together with its long line of previously referenced instructional error cases disclaiming the propriety of a directed verdict against the accused in a criminal case, [26] should leave no doubt about the correct result in this case. The directed verdict against petitioner below on the element of materiality is a structural error which defies analysis for prejudicial effect under principles of harmless -- or plain -- error review. See United States v. Johnson, 1995 WL 715298 at * 4 (4th Cir. 1995)(because "the jury was conclusively instructed" on

---

[25] In this portion of his opinion in Sullivan, Justice Scalia cited the line of instructional error cases we have referred to in Section I of this amicus brief thereby endorsing their plain applicability to this type of issue as well. See id. at 2082-83 (citing, inter alia, Rose v. Clark, Pope v. Illinois, Yates v. Evatt and Carella v. California).

[26] See Section I, supra.

element in question, "the case before us is not subject to harmless error review"). [27]

Yet ignoring Fulminante and Sullivan, the Government apparently here -- and in a number of cases like Mr. Knoll's throughout the lower federal courts -- seizes upon Chief

---

[27] Although "harmless" error analysis under Rule 52(a) and "plain" error analysis under Rule 52(b) are different, they share the common characteristic for present purposes of requiring a reviewing court to endeavor to quantitatively assess the prejudicial impact of the error in question upon the jury's decision at trial. With respect to the instant structural error, a directed verdict, that type of quantitative analysis simply cannot be conducted at all, under either rule. See United States v. Wiles, 1996 WL 707539 at * 13 (structural error not susceptible to "harmless" or "plain" error review); accord, United States v. Jerke, 896 F. Supp. at 964 (harmless error analysis cannot apply when court decided materiality element as matter of law and instructed jury not to consider it); People v. Avila, 43 Cal. Rptr. 2d 853, 862 (2d DCA 1995)("harmless error analysis presumably would not apply if a court directed a verdict for the prosecution in a criminal trial by jury")(quoting Rose v. Clark, supra). In its decision in Peck v. United States, supra, issued almost exactly one year ago, and subsequently reheard en banc without an en banc decision yet, the Second Circuit also concluded that an analogous type of instructional defect at trial amounted to "structural error" that could not be remedied through appellate reference to the remaining evidence and jury findings at trial. See Peck, 1995 WL 764340 at * 6-8; compare United States v. Ballistrea, 1996 U.S. App. LEXIS 30967 at * 19-20 (2d Cir. 11/25/96)(finding an "omitted element" Gaudin claim to constitute "plain error").

Justice Rehnquist's concurring opinion in Gaudin to bolster the argument that harmless and/or plain error review might still be appropriately applied in this case. See 115 S. Ct. at 2320-22. [28] It is clear from the text of this opinion, however, that it did not reach any conclusions on either of these issues, but merely flagged them as open questions for the future. We submit, for the reasons articulated throughout this amicus brief, that in the context of this case neither of those types of appellate review can logically be applied. The error below was simple, "the wrong entity judged the defendant guilty;" [29] and there is no analysis that this or any other reviewing Court can conduct that can change the status of the entity that sat in judgment on the defendant to that required by the Constitution. Accord, California v. Roy, 1996 WL 633365 at * 3 (concurring opinion by Justice Scalia, joined by Justice Ginsburg). [30]

---

[28] In this concurring opinion, in which Justices O'Connor and Breyer joined, Chief Justice Rehnquist noted, inter alia, that "the Government has not argued here that the error in this case was either harmless or not plain," (id. at 2321), and then went on to describe each of these potential categories of error in the Gaudin context.

[29] Sullivan v. Louisiana, 113 S. Ct. at 2082 (quoting Rose v. Clark, 478 U.S. at 578). As Justice Scalia found in Sullivan, the Sixth Amendment "requires an actual jury finding of guilty." Id. (emphasis added).

[30] It is Mr. Knoll's alternative position that this case, and his, present the type of situation contemplated by this Court in the leading "plain error" case of United States v. Olano, 113 S. Ct. 1770 (1993), when it noted that "[a]n error may 'seriously affect the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's

CONCLUSION

For the foregoing reasons, together with those asserted by the petitioner, this Court should rule that: 1) a trial judge can never direct a verdict against a criminal defendant on any element of the offense with which he is charged no matter how overwhelming the evidence with respect to that element might appear to be; 2) an error that is unobjected to at trial because it was consistent with established and existing law should be reviewed on appeal under Rule 52(a) of the Federal Rules of Criminal Procedure; and 3) a directed verdict by a trial judge constitutes "structural error" under Sullivan v. Louisiana which cannot be subjected to "harmless" error review.

Respectfully submitted,

STEPHEN L. BRAGA *
ROBERT J. McGAHAN
MILLER, CASSIDY,
LARROCA & LEWIN, LLP
2555 M Street, N.W.
Washington, D.C. 20037
(202) 293-6400

December 30, 1996

Counsel Of Record

innocence." (Emphasis added). Allowing a trial judge to override a defendant's constitutional right to trial by jury by directing a verdict against him certainly undermines both the "integrity" and the "public reputation" of such a proceeding.